

NOTE

TREATY INTERPRETATION AND COMMERCE CLAUSE
ECONOMICS IN *UNITED STATES V. NAGARWALA**Michael Campbell**

ABSTRACT

In 2019, the United States District Court for the Eastern District of Michigan struck down the FGM Act, a 1996 statute which makes performing female genital mutilation a federal crime. The court held that the FGM Act was an unconstitutional overstep of Congress' authority to regulate interstate commerce under the Commerce Clause, since FGM is not "economic in nature." Additionally, the court held that the government could not justify the FGM Act as an exercise of Congress' authority to implement the International Covenant on Civil and Political Rights (the "ICCPR"), since the court did not interpret the plain language of the treaty as a commitment to eradicate FGM. This Note argues that although the court's "economic in nature" holding properly applied an increasingly narrow interpretation of the Commerce Clause, its ICCPR holding failed to consider extra-textual sources usually employed in treaty interpretation. This Note also suggests that Congress may have clearer authority to criminalize FGM if the United States ratified the Convention on the Elimination of Discrimination Against Women ("CEDAW"), a treaty the United States has only signed.

ABSTRACT.....	1295
I. INTRODUCTION.....	1296

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II.	INTERNATIONAL AND DOMESTIC PREVALENCE OF FGM	1301
III.	THE FGM ACT EXCEEDS CONGRESS'S COMMERCE POWER UNDER LOPEZ AND MORRISON	1303
	A. The Supreme Court Reigns in the Commerce Power in Lopez and Morrison	1304
	B. Nagarwala's Commerce Clause Interpretation: FGM is not "Economic in Nature"	1306
	C. Criticism of the Nagarwala Opinion	1307
	D. Transaction-Based Commerce Clause "Economics" After Lopez and Morrison	1309
IV.	CONGRESSIONAL AUTHORITY TO PASS TREATY-IMPLEMENTING LEGISLATION AS A BASIS FOR CRIMINALIZING FGM	1313
	A. Congress' Treaty-Implementing Power as Authority for Legislation	1313
	B. Holland as the Congress' Basis for Implementing VAWA under CEDAW	1315
	C. The Nagarwala Court Should Have Held that the ICCPR Authorizes Congress to Criminalize FGM	1317
	D. Congress Likely has the Authority to Pass the FGM Act if the United States Ratifies CEDAW	1320
	E. The Post-Ratification Conduct of CEDAW Signatory Nations Suggests that CEDAW Could be a Basis for an FGM Ban in the United States	1323
V.	CONCLUSION	1325

I. INTRODUCTION

Approximately 200 million women and girls worldwide are victims of some form of female genital mutilation ("FGM"),¹ defined by the US Department of Health and Human Services as the

1. See G.A. Res. 71/168, at 2 (Feb. 2, 2017) [hereinafter *G.A. Res.*]; *Female genital mutilation (FGM)*, WORLD HEALTH ORG. [WHO] (2013), <https://www.who.int/reproductivehealth/topics/fgm/prevalence/en/> [<https://perma.cc/6HE6-22NM>] (last visited Apr. 5, 2020).

“piercing, cutting, removing, or sewing closed all or part of a girl’s or woman’s external genitals for no medical reason.”² Although the cultural and religious practice is most common in Africa, the Middle East, and Southeast Asia,³ researchers estimate that over 513,000 women and girls in the United States are FGM victims, or are at risk of FGM.⁴ FGM is recognized as an egregious human rights violation, as it increases a victim’s vulnerability to infection, HIV, hepatitis, and reproductive health problems.⁵ Despite the well-documented medical dangers associated with FGM,⁶ only thirty-five states have criminalized FGM procedures as of 2019.⁷

In 1996, Congress passed the Female Genital Mutilation Act (the “FGM Act”),⁸ which makes performing FGM on victims under the age of eighteen a federal crime.⁹ Specifically, section 116(a) imposes fines and/or imprisonment of no longer than five years for anyone who “knowingly circumcises, excises, or infibulates the whole or any part of the labia majora or labia minora or clitoris of another person who has not attained the age of 18 years.”¹⁰

2. *Female Genital Mutilation or Cutting*, OFF. WOMEN’S HEALTH (Apr. 1, 2019), <https://www.womenshealth.gov/a-z-topics/female-genital-cutting#17> [<https://perma.cc/GN8V-8FMA>].

3. See Jewel Llamas, *Female Circumcision: The History, the Current Prevalence and the Approach to a Patient* (Apr. 2017), <https://med.virginia.edu/family-medicine/wp-content/uploads/sites/285/2017/01/Llamas-Paper.pdf> [<https://perma.cc/5RPU-X2PZ>]; Wanda K. Jones et al., *Female Genital Mutilation/Female Circumcision*, PUBLIC HEALTH REP. 368, 370 (1997), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1381943/pdf/pubhealthrep00038-0014.pdf> [<https://perma.cc/XDX4-Y443>].

4. See Howard Goldberg et al., *Female Genital Mutilation/Cutting in the United States: Updated Estimates of Women and Girls at Risk*, NIH (2012), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4765983/> [<https://perma.cc/CL85-BSAN>] (explaining that the study was unable to distinguish between women in the United States who had actually undergone FGM, and women at risk of FGM).

5. See *G.A. Res.*, *supra* note 1, at 2; Goldberg et al., *supra* note 4.

6. See *Health Risks of Female Genital Mutilation (FGM)*, WHO, <https://www.who.int/sexual-and-reproductive-health/health-risks-of-female-genital-mutilation> [<https://perma.cc/9D9K-KKP7>] (last visited Mar. 18, 2020).

7. See *FGM Legislation by State*, AHA FOUNDATION, <https://www.theahafoundation.org/female-genital-mutilation/fgm-legislation-by-state/> [<https://perma.cc/9YJ8-L6SV>] (last visited Mar. 18, 2020).

8. See 18 U.S.C. § 116(a) (1996).

9. See *id.*; Michelle E. Shember, *Female Genital Mutilation and the First Amendment: An Analysis of State Fgm Statutes and the Right to Free Exercise*, 96 U. DET. MERCY L. REV. 431, 436 (2019); Sohail Wahedi, *The Health Law Implications of Ritual Circumcisions*, 22 QUINNIPIAC HEALTH L.J. 209, 212 (2019).

10. 18 U.S.C. § 116(a) (1996).

Although the FGM Act has been in effect since 1996, the US Department of Justice (the “DOJ”) has only brought charges under the act twice: once in 2005¹¹ and more recently in *United States v. Nagarwala*,¹² which is the first time the constitutionality of the FGM Act has been challenged as exceeding the scope of Congressional authority.¹³

In *Nagarwala*, eight defendants were charged under the FGM Act for performing or assisting in the FGM of four young girls in Michigan.¹⁴ The government alleged that emergency room physician Dr. Jumana Nagarwala performed the FGM with assistants Farida Attar and Tahera Shafiq.¹⁵ The indictment further alleged that Dr. Fakhruddin Attar allowed Dr. Nagarwala to use his clinic in Michigan for the procedures.¹⁶ The four mothers of the victims, members of the Dawoodi Bohra Shiite Muslim community, were also charged for bringing their daughters to the clinic from Michigan, Illinois, and Minnesota, knowing that their daughters would be mutilated.¹⁷ Some of the daughters later told police that the mothers had told them they were going on a “special girls trip,” and that they were going to a doctor’s office to “get the germs out.”¹⁸ Bohras who practice FGM disagree over the cultural purpose for the procedure.¹⁹ Where some see it as a method of

11. See *United States v. Nagarwala*, 350 F. Supp. 3d 613, 627 (E.D. Mich. 2018); *TWO WHO PLOTTED TO PERFORM FEMALE GENITAL MUTILATION SENTENCED TO FEDERAL PRISON*, DEP’T OF JUST. (June 8, 2005), <https://www.justice.gov/archive/usao/cac/Pressroom/pr2005/089.html> [<https://perma.cc/KR7Z-2M78>]; Daniel Rice, *Female Genital Mutilation and the Treaty Power: What Congress Can Do*, JUST SECURITY (Oct. 29, 2019), <https://www.justsecurity.org/66757/female-genital-mutilation-and-the-treaty-power-what-congress-can-do/> [<https://perma.cc/92WJ-LXPD>] (last visited Apr. 5, 2020).

12. See *Nagarwala*, 350 F. Supp. 3d at 613.

13. See Pam Belluck, *Federal Ban on Female Genital Mutilation Ruled Unconstitutional by Judge*, N.Y. TIMES (Nov. 21, 2018), <https://www.nytimes.com/2018/11/21/health/fgm-female-genital-mutilation-law.html> [<https://perma.cc/8R9Q-DHEZ>].

14. See *Nagarwala*, 350 F. Supp. 3d at 615–16.

15. See *id.*

16. See *id.*

17. See *id.*; Belluck, *supra* note 13.

18. Criminal Complaint at 7, *United States v. Nagarwala*, 350 F. Supp. 3d 613 (E.D. Mich. 2018), available at <https://www.justice.gov/opa/press-release/file/957381/download> [<https://perma.cc/JA9F-PGKC>].

19. Fahrinisa Campana, *In India’s Dawoodi Bohra community, there’s a growing debate about FGM*, PUB. RADIO INTL. (Aug. 2, 2018, 9:45AM), <https://www.pri.org/stories/2018-08-02/indias-dawoodi-bohra-community-theres-growing-debate-about-fgm> [<https://perma.cc/N9NC-CDN8>]; Tasneem Raja, *I Underwent Genital Mutilation as a Child—Right Here in the United States*, MOTHER JONES (Apr. 21, 2017),

curbing female promiscuity, others falsely believe it promotes hygiene.²⁰ Although the government alleged that Dr. Nagarwala performed FGM on nine victims,²¹ federal prosecutors estimated that Dr. Nagarwala may have actually performed FGM on over one hundred girls.²²

First, Judge Bernard A. Friedman of the Eastern District of Michigan held that the FGM Act was not a valid exercise of Congress's power to pass treaty-implementing legislation.²³ The government attempted to rely on two provisions in the International Covenant on Civil and Political Rights (the "ICCPR"), a 1966 United Nations treaty with seventy-four signatory parties, to justify the federal FGM ban.²⁴ Article 3 is the United States' treaty commitment to "ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant,"²⁵ and Article 24 states that "[e]very child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State."²⁶ The court explained that "as laudable as the [FGM Act] may be," FGM bears no rational relationship to the ICCPR treaty provisions, and is therefore not a valid exercise of Congress's power to pass treaty-implementing legislation.²⁷

Second, the court held that the government cannot justify the FGM Act as a valid exercise of Congress' power to regulate

<https://www.motherjones.com/politics/2017/04/genital-cutting-indian-doctor-women-khatna/> [<https://perma.cc/33J3-SS3K>].

20. *Id.*

21. *Id.*

22. U.S. Immigr. & Customs Enforcement, *ICE fights to protect girls and women from mutilation and abuse*, DEP'T OF HOMELAND SECURITY (Nov. 20, 2017), <https://www.ice.gov/news/releases/ice-fights-protect-girls-and-women-mutilation-and-abuse> [<https://perma.cc/VH4R-S8EE>]; Robert Snell, *Genital mutilation case could involve up to 100 victims*, DETROIT NEWS (June 7, 2017, 4:25PM) <https://www.detroitnews.com/story/news/local/detroit-city/2017/06/07/feds-estimate-genital-mutilation-victims/102594478/> [<https://perma.cc/9F8U-2XSF>].

23. *Nagarwala*, 350 F. Supp. 3d at 620-21.

24. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

25. *Nagarwala*, 350 F. Supp. 3d at 617-18; ICCPR, *supra* note 24, art. 3.

26. *Nagarwala*, 350 F. Supp. 3d at 617-18; ICCPR *supra* note 24, art. 4.

27. *Nagarwala*, 350 F. Supp. 3d at 618.

interstate commerce under the Commerce Clause.²⁸ Although the Commerce Clause has been a broad source of Congressional authority for most of the Twentieth Century,²⁹ the Supreme Court in the last three decades has narrowed Congress's commerce power by requiring that the regulated activity be "economic in nature" for the law to find justification under the Commerce Clause.³⁰ The court in *Nagarwala* reasoned that since FGM is a "form of physical assault" and not an "[illegal] healthcare service," it is not "economic in nature," and the federal ban is an unconstitutional overstep of Congress's Commerce Clause authority.³¹

The DOJ initially appealed the District Court's decision to the US Circuit Court for the Sixth Circuit in 2018,³² but informed the US Senate (the "Senate") that it would withdraw from its appeal in an April 10, 2019 letter.³³ The letter explains that the DOJ "reluctantly concluded" that it had no reasonable defense of the FGM Act provision.³⁴ In response, the US House of Representatives (the "House") moved to intervene and argue the constitutionality of the FGM Act on appeal.³⁵ After the House's motion to intervene, the DOJ opposed the motion by moving to withdraw its appeal, which

28. *Id.* at 629-30.

29. See *United States v. Durham*, 902 F.3d 1180, 1200 (10th Cir. 2018) ("Between 1937 and 1995, the Court did not invalidate one federal law under the [Interstate Commerce Clause]"); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW § 3.4.4 (5th ed. 2015).

30. See *United States v. Lopez*, 514 U.S. 549, 560-61 (1995) (holding that the Gun-Free School Zone Act's federal ban on possessing a firearm near a school zone exceeds Congress's commerce power, since "mere possession" of a firearm is not an economic activity); see also *United States v. Morrison*, 529 U.S. 598, 613 (2000) (holding that the Violence Against Women Act's creation of a federal cause of action for sexual assault victims exceeds Congress's commerce power, since sexual assault is not "economic in nature").

31. *Nagarwala*, 350 F. Supp. 3d at 630.

32. Notice of Appeal, *United States v. Nagarwala*, No. 19-1015 (6th Cir. filed Jan. 3, 2019); Rice, *supra* note 11.

33. Letter from Noel J. Francisco, Solicitor General of the United States to Diane Feinstein, Ranking Member of the Committee on the Judiciary, DEP'T OF JUST. (Apr. 10, 2019), https://www.justice.gov/oip/foia-library/osg-530d-letters/4_10_2019/download [https://perma.cc/TY9W-X3VF].

34. *Id.*

35. Reply Brief in Support of Motion of the U.S. House of Representatives to Intervene, *United States v. Nagarwala*, No. 19-1015 (6th Cir. filed June 7, 2019), available at <https://www.law.georgetown.edu/icap/wp-content/uploads/sites/32/2019/06/Nagarwala-Reply-Brief-in-Support-of-Motion-to-Intervene.pdf> [https://perma.cc/7KFF-BC4L].

was granted by the court.³⁶ Daniel Rice, counsel for the House for its motion to intervene, has suggested that the DOJ did “everything in its power” to prevent a constitutional defense of the FGM Act by withdrawing and opposing the motion to intervene.³⁷

Part II of this Note will provide a brief explanation of the international prevalence of FGM, and discuss its spread to the United States. Part III will explain the *Nagarwala* Court’s holding that the FGM Act exceeds Congress’s authority under the Commerce Clause. Part III will suggest that Judge Friedman’s Commerce Clause holding correctly applies *United States v. Lopez* and *United States v. Morrison*’s narrow Commerce Clause interpretation requiring the regulated activity to be “economic in nature.”

Part IV will address the *Nagarwala* Court’s treaty interpretation of the ICCPR. The Note will first explain Congress’s authority under *Missouri v. Holland* to pass legislation “necessary and proper” to implement treaties, even if the legislation exceeds Congress’s commerce power. Next, the Note will argue that the *Nagarwala* Court correctly concluded that the FGM ban is not a valid implementation of ICCPR Article 3. With respect to ICCPR Article 24, Part IV will suggest that Judge Friedman’s analysis neglected to consult extra-textual sources usually employed in treaty interpretation. Finally, Part IV will suggest that Congress might justify the FGM Act under its treaty-implementing power if the United States were to ratify the Convention on the Elimination of all Forms of Discrimination Against Women (“CEDAW”), a treaty the United States has signed but not ratified.

II. INTERNATIONAL AND DOMESTIC PREVALENCE OF FGM

Although the precise origin of FGM is unknown, the practice is most prevalent in parts of Africa, the Middle East, and Southeast Asia.³⁸ Initially, the United Nations and World Health Organization referred to the dangerous practice as “female circumcision” in its studies.³⁹ Since the 1990s, however, the practice has widely been known as “female genital mutilation.”⁴⁰ Some advocates of FGM,

36. Rice, *supra* note 11.

37. *Id.*

38. Llamas, *supra* note 3; Jones et al., *supra* note 3, at 370.

39. Llamas, *supra* note 3.

40. *Id.*

usually from the areas in which the practice is prevalent, prefer the name “circumcision” to “mutilation” due to its religious and cultural significance.⁴¹

UNICEF estimates that FGM is almost a universal practice in Somalia, Guinea, and Yemen, with rates around ninety percent.⁴² Although a majority of women in most countries in Africa and the Middle East think the practice should end, over half of the female population in Mali, Sierra Leone, Guinea, the Gambia, Somalia, and Egypt thinks the practice should continue.⁴³ The justifications for FGM vary from culture to culture, but it is often performed to preserve virginity, improve hygiene, engage in religious tradition, or serve as a cultural “rite of passage.”⁴⁴ The World Health Organization has recognized that older women who have undergone FGM “often become gatekeepers of the practice” in their communities, which entails preparing females for FGM, performing FGM, and punishing females who refuse to undergo FGM.⁴⁵

Although international FGM rates have declined over the last three decades,⁴⁶ the practice has spread to areas of Australia, North America, and Europe, corresponding to the frequency of migrants from the countries where FGM is prevalent.⁴⁷ A 2013 study found that in the United States, approximately 500,000 women and girls are victims of FGM, or are at risk of FGM.⁴⁸ California, New York, and Minnesota have the most FGM victims or people at risk of FGM,⁴⁹ and FGM is most prevalent in urban centers of the United States like New York, Washington, D.C., Minneapolis, Los Angeles,

41. Jones et al., *supra* note 3, at 370.

42. *Female genital mutilation (FGM)*, UNICEF DATA (Feb. 2020), <https://data.unicef.org/topic/child-protection/female-genital-mutilation/> [<https://perma.cc/6GHL-P8MJ>] [hereinafter UNICEF]; see Michelle Krupa, *The alarming rise of female genital mutilation in America*, CNN HEALTH (July 14, 2017, 10:06 AM), <https://www.cnn.com/2017/05/11/health/female-genital-mutilation-fgm-explainer-trnd/index.html> [<https://perma.cc/9SUC-YG96>].

43. UNICEF, *supra* note 42.

44. Jones et al., *supra* note 3, at 370.

45. Christopher J. Coyne & Rachel L. Coyne, *The Identity Economics of Female Genital Mutilation*, 48 J. DEVELOPING AREAS 137, 139, 146 (2014).

46. UNICEF, *supra* note 42.

47. *Id.*; Goldberg et al., *supra* note 4.

48. Population Reference Bureau [PRB], *U.S. Women and Girls Potentially at Risk for FGM/C, by State, 2013 Preliminary Data*, PRB (2013), <https://assets.prb.org/pdf15/us-fgmc-all-states-table.pdf> [<https://perma.cc/M7FA-Z695>].

49. *Id.*

and Seattle.⁵⁰ A Centers for Disease Control (the “CDC”) study found an increase in FGM rates in the United States between 1990-2000,⁵¹ which reiterates the notion that the increase is a result of rapid growth in numbers of immigrants from countries where FGM is prevalent during those years.⁵²

III. THE FGM ACT EXCEEDS CONGRESS’S COMMERCE POWER UNDER LOPEZ AND MORRISON

This section will suggest that the *Nagarwala* Court’s holding that the FGM Act exceeds Congress’s Commerce Power seems to correctly apply the Supreme Court’s narrow reading of the Commerce Clause in *Lopez* and *Morrison*, contrary to the arguments of the government,⁵³ Daniel Rice,⁵⁴ and women’s rights group AHA Foundation⁵⁵ (whether the narrow Commerce Clause interpretation in *Lopez* and *Morrison* is convincing is beyond the scope of this Note).

Article 1, Section 8, Clause 3 of the United States Constitution (the “Commerce Clause”) authorizes Congress “to regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes.”⁵⁶ For most of the twentieth century, the Supreme Court’s broad interpretation of the Commerce Clause allowed Congress wide regulatory authority. Between 1937-1995, the Supreme Court consistently upheld Congressional legislation under a lenient test,⁵⁷ where Congress had the authority to (1) regulate interstate travel, as long as the law does not violate

50. Ranit Mishori et al., *Female Genital Mutilation or Cutting*, AM. FAM. PHYSICIAN (Jan. 1, 2018), <https://www.aafp.org/afp/2018/0101/p49.html> [<https://perma.cc/CT9F-XYU8>].

51. Goldberg et al., *supra* note 4.

52. *Id.*

53. *United States v. Nagarwala*, 350 F. Supp. 3d 613, 617–18 (E.D. Mich. 2018).

54. Rice, *supra* note 11.

55. Brief of *Amicus Curiae* AHA Foundation in Support of the United States of America at 9–14, *United States v. Nagarwala*, 350 F. Supp. 3d 613 (E.D. Mich. 2018) (No. 18-mc-51358).

56. U.S. CONST. art. 1, § 8, cl. 3 [hereinafter Commerce Clause].

57. See, e.g., *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937); *United States v. Darby*, 312 U.S. 100 (1941); *Wickard v. Fillburn*, 317 U.S. 111 (1942); *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

another Constitutional provision,⁵⁸ and (2) regulate any activity having a close or substantial relationship to, or effect on interstate commerce.⁵⁹ The second category of commerce power was especially broad, since the relationship to interstate commerce could be merely theoretical.⁶⁰ Under this standard, the Supreme Court did not find a single federal law to exceed Congress's Commerce Clause authority from 1937-1995.⁶¹

A. The Supreme Court Reigns in the Commerce Power in Lopez and Morrison

In 1995, the Supreme Court in *Lopez* held that a provision of the Gun-Free School Zone Act of 1990, banning the possession of firearms near school zones, exceeded Congress' power under the Commerce Clause.⁶² Justice Rehnquist's majority opinion identified three separate categories of activity which Congress has the authority to regulate under the Commerce Clause (the *Lopez* Court divided the first traditional commerce category described above into two distinct categories):⁶³

First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate

58. See *Thomson v. Union Pacific R.R.*, 76 U.S. (9 Wall.) 579, 19 L.Ed. 792 (1870); *Luxton v. North River Bridge Co.*, 153 U.S. 525, 14 S. Ct. 891, 38 L.Ed. 808 (1894); 1 TREATISE ON CONST. L. § 4.8(a) (explaining that this first category authorizes Congress to regulate essentially anything or anyone which crosses state lines) [hereinafter Modern Commerce Power Tests].

59. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977); Modern Commerce Power Tests, *supra* note 58, § 4.8(a).

60. See *Wickard*, 317 U.S. 111 (holding that a federal wheat quota applied to a farmer was justified under the Commerce Clause, even though the farmer grew the wheat for self-consumption and not for sale. The court reasoned that theoretically, many farmers growing wheat for self-consumption could affect the supply and demand for wheat, which could affect interstate commerce); *Heart of Atlanta Motel, Inc.*, 379 U.S. 241 (holding that the Civil Rights Act of 1964 provision banning discrimination at private businesses was a valid exercise of Congress' Commerce Power, since discrimination at businesses would theoretically affect people's interstate travel destinations, and the places travelers would spend money); § 4.8(a) Modern Commerce Power Tests, *supra* note 58.

61. See *United States v. Durham*, 902 F.3d 1180, 1200 (10th Cir. 2018); CHEMERINSKY, *supra* note 29, § 3.4.4.

62. *United States v. Lopez*, 514 U.S. 549, 567-68 (1995).

63. Modern Commerce Power Tests, *supra* note 58, § 4.8(a).

activities. Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce.⁶⁴

Only the third category of commerce power was at issue in *Lopez*,⁶⁵ and it was the only category at issue in *Nagarwala*.⁶⁶ The *Lopez* majority articulated the rule for Congressional authority under this third category: first, the regulated activity must have a "substantial effect" on interstate commerce.⁶⁷ Second, the Court will give less deference to federal legislation if it does not regulate "economic activity."⁶⁸ This "economic activity" prong is particularly relevant for the *Nagarwala* Court's rejection of the FGM Act.⁶⁹

With respect to the first prong, the Court rejected the government's argument that gun possession in school zones might affect interstate commerce, since gun violence takes a toll on the national economy.⁷⁰ Justice Rehnquist explained that allowing Congress to regulate activity with such a tenuous relationship to interstate commerce would allow Congress to regulate virtually any activity.⁷¹ Under the second prong, the *Lopez* Court held that possession of guns near school zones is "in no sense an economic activity," rendering this provision of the Gun-Free School Zone Act outside of Congress' commerce power.⁷² Although Justice Kennedy's *Lopez* concurrence indicates that a majority of justices thought this "economic activity" holding was not a rejection of

64. *Lopez*, 514 U.S. at 558-59.

65. *Id.* at 559.

66. *United States v. Nagarwala*, 350 F. Supp. 3d 613, 622 (E.D. Mich. 2018).

67. *See Lopez*, 514 U.S. at 557, 563; Modern Commerce Power Tests, *supra* note 58, § 4.8(a) (Although the "substantial effect" language used by the *Lopez* majority is consistent with the Commerce Clause precedent from 1937-1995, it has been argued that the commerce cases prior to *Lopez* are more accurately interpreted as requiring an "insignificant or trivial" effect on interstate commerce); Deborah Jones Merritt, *Commerce!*, 94 MICH. L. REV. 674, 677 (1995).

68. *Lopez*, 514 U.S. at 560 ("Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained."); Modern Commerce Power Tests, *supra* note 58, § 4.8(a).

69. *Nagarwala*, 350 F. Supp. 3d at 627.

70. *Lopez*, 514 U.S. at 563-64.

71. *Id.* at 564.

72. *Id.* at 567.

Commerce Clause precedent,⁷³ this narrow reading requiring the regulated activity to be “commercial in nature”⁷⁴ is seen as a dramatic shift in the Supreme Court’s federalism jurisprudence.⁷⁵ After *Lopez*, the Congressionally regulated activity must not only have a theoretical impact on interstate commerce—there must also be something about the activity that is *intrinsically* economic.⁷⁶

Five years later, the Supreme Court applied *Lopez*’s narrow Commerce Clause interpretation in *Morrison*.⁷⁷ In *Morrison*, the Court struck down a provision of the Violence Against Women Act (“VAWA”) granting women a federal cause of action for sexual assault.⁷⁸ The Court held that “[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity.”⁷⁹ Although violence against women would likely satisfy the lenient “aggregate effect on interstate commerce” prong,⁸⁰ the Court held that it is not an *intrinsically* commercial activity under *Lopez*.⁸¹ After *Lopez* and *Morrison*, an activity must be “economic in nature” for Congress to be able to regulate it under the commerce power.⁸²

*B. Nagarwala’s Commerce Clause Interpretation: FGM is not
“Economic in Nature”*

In *Nagarwala*, Judge Friedman applied the narrow “economic in nature” standard from *Lopez* and *Morrison* to strike down the Congressional criminalization of FGM.⁸³ First, the government argued that the FGM Act is within Congress’ commerce power by

73. *Id.* at 574 (Kennedy, J., concurring) (citing the country’s “immense stake in the stability of our Commerce Clause jurisprudence”); see generally 3 WILLIAM J. RICH, MODERN CONSTITUTIONAL LAW § 35:6 (3d ed. 2011).

74. *Id.* at 627 (Breyer, J., dissenting).

75. *Id.* at 628–29 (“The second legal problem the Court creates comes from its apparent belief that it can reconcile its holding with earlier cases by making a critical distinction between ‘commercial’ and noncommercial “transaction[s]”).

76. David M. Driesen, *The Economic/Noneconomic Activity Distinction Under the Commerce Clause*, 67 CASE W. RES. L. REV. 337, 344–45 (2016).

77. *United States v. Morrison*, 529 U.S. 598, 613 (2000).

78. *Id.* at 598, 627.

79. *Id.* at 613.

80. *Id.* at 610.

81. *Id.* at 634 (Souter, J., dissenting) (citing a Congressional finding that gender-motivated violence impacts interstate commerce by “detering potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved, in interstate commerce”).

82. *Id.* at 613.

83. *United States v. Nagarwala*, 350 F. Supp. 3d 613, 627–28 (E.D. Mich. 2018).

attempting to emphasize the existence of an interstate market for FGM.⁸⁴ The court explained that the government failed to show that such a market exists, holding that FGM was a “purely local” crime in the realm of state authority.”⁸⁵ Next, the court rejected the government’s argument that FGM is an “illegal form of healthcare,” where healthcare is considered an intrinsically economic activity within Congress’ commerce power.⁸⁶ The court explained that “FGM is a form of *physical assault*, not anything approaching a healthcare service.”⁸⁷ Judge Friedman analogized the FGM Act to the Gun-Free School Zone Act in *Lopez* by suggesting that performing FGM, like possessing a gun in a school zone, is a “criminal act that ‘has nothing to do with commerce or any sort of economic enterprise.’”⁸⁸

C. Criticism of the Nagarwala Opinion

The *Nagarwala* Court’s Commerce Clause holding was met with criticism by legal scholars and women’s rights activists. Daniel Rice⁸⁹ argues that the *Nagarwala* Court misapplied the language from *Bond v. United States*, which suggests that Congress cannot regulate “purely local” crimes under its commerce power, which are left to the authority of the states.⁹⁰ He suggests that a relevant consideration in determining whether a crime is “purely local” is “whether the international community has condemned the relevant practice and joined together to eradicate it.”⁹¹ Daniel Rice points to statements from the United Nations, the Trump Administration, US Immigration and Customs Enforcement (“ICE”), the DOJ, and others condemning FGM and recognizing it as a great international concern.⁹² Further, he points out that FGM often occurs “transnationally,” as FGM performers and victims are often transported for the procedure, as in *Nagarwala*.⁹³ For these

84. *Id.* at 627.

85. *Id.*

86. *Id.* at 628.

87. *Id.* (emphasis added).

88. *Id.* at 628 (citing *United States v. Lopez*, 514 U.S. 549, 561 (1995)).

89. Counsel for the House in its motion to intervene in the *Nagarwala* appeal.

90. *Nagarwala*, 350 F. Supp. 3d at 619-20 (quoting *Bond v. United States*, 572 U.S. 844, 856 (2014)).

91. Rice, *supra* note 11.

92. *Id.*

93. *Id.*

reasons, Daniel Rice disagrees with the *Nagarwala* Court's holding that FGM is a "purely local" crime in the realm of state authority.⁹⁴

Although Daniel Rice presents a convincing argument that FGM cannot be considered a "purely local" activity, the argument fails to address the major consideration of *Lopez* and *Morrison*'s Commerce Clause analysis—the "economic in nature" prong. Daniel Rice briefly addresses the economic ramifications of FGM, correctly suggesting that medical complications caused by FGM take a toll on the national economy by increasing healthcare costs, and that FGM providers are often compensated.⁹⁵ This point, however, only seems to establish the lenient Commerce Clause test used before *Lopez*, requiring only that the regulated activity have an impact on interstate commerce in the aggregate.⁹⁶ After the narrow interpretation of *Lopez* and *Morrison*, the regulated activity must also be "economic in nature."⁹⁷ Examining the economic impact of FGM is not enough after *Lopez* and *Morrison*. Now, the court must also find something *intrinsically* economic or commercial about the activity for Congress to have the authority to regulate the activity under the Commerce Clause.

The AHA Foundation ("AHA") submitted an *amicus curiae* brief in *Nagarwala* which more directly addresses the "economic in nature" prong, though it ultimately fails to demonstrate that FGM is inherently "economic" or "commercial" under the narrow interpretation of *Lopez* and *Morrison*, and the Supreme Court's characterization of "economics."⁹⁸ AHA first points out that FGM is "generally bought and paid for."⁹⁹ They cite findings that families often pool resources to pay for a provider to perform FGM on groups of girls, and that many FGM providers perform FGM as their source of livelihood.¹⁰⁰ The government's brief in *Nagarwala* makes a similar attempt to characterize FGM as economic, pointing out that Dr. Nagarwala's FGM in Michigan was performed with "commercially-sold medical tools and supplies."¹⁰¹ AHA also

94. *Id.*

95. *Id.*

96. See *Wickard v. Filburn*, 317 U.S. 111 (1942).

97. *United States v. Morrison*, 529 U.S. 598, 613 (2000).

98. Brief of *Amicus Curiae* AHA Foundation in Support of the United States of America at 1, *United States v. Nagarwala*, 350 F. Supp. 3d 613 (E.D. Mich. 2018) (No. 18-mc-51358).

99. *Id.* at 12.

100. *Id.* at 12-13.

101. *Nagarwala*, 350 F. Supp. 3d at 628.

supports the economic nature of FGM by pointing out that in some cultures, the practice is used for the “insidious” purpose of increasing the desirability of an FGM victim as a bride, which increases the “bride price” for the victim’s family upon marriage.¹⁰²

Although these are circumstances where FGM *could* relate to an economic transaction, AHA’s argument does not establish that FGM meets *Lopez* and *Morrison*’s both high and narrow standard of “economic in nature.”¹⁰³ In *Lopez*, the Supreme Court seems to reason that although gun possession in a school zone *could* be part of an economic transaction (the defendant in *Lopez* actually brought the gun to his school to sell for US\$40), the dispositive question is whether the activity is *inherently* economic or commercial¹⁰⁴—whether it is an activity inextricably linked to economic activity.

D. Transaction-Based Commerce Clause “Economics” After Lopez and Morrison

To determine whether FGM meets this standard, it is necessary to examine the meaning of “economic” or “commercial” in the Commerce Clause context. The *Lopez* Court did not articulate a precise test for its distinction between “commercial” and “noncommercial” activity,¹⁰⁵ nor did the *Morrison* Court define its phrase “economic in nature.”¹⁰⁶ This lack of clarity could leave judges susceptible to applying their personal conceptions of “economics” in Commerce Clause challenges.¹⁰⁷

Judge Richard Posner, a major figure in the Law and Economics movement, broadly defines “economics” as “the science of rational choice in a world - our world - in which resources are limited in relation to human wants.”¹⁰⁸ Author Scott Powers makes

102. Brief of *Amicus Curiae* AHA Foundation in Support of the United States of America at 13, *United States v. Nagarwala*, 350 F. Supp. 3d 613 (E.D. Mich. 2018) (No. 18-mc-51358).

103. *United States v. Morrison*, 529 U.S. 598, 613 (2000).

104. Michael E. Rosman, *Facial Challenges and the Commerce Clause: Rethinking Lopez and Morrison*, 4 FAULKNER L. REV. 1, 21-22 (2012).

105. *United States v. Lopez*, 514 U.S. 549, 566 (1995).

106. *Morrison*, 529 U.S. at 613.

107. Scott T. Powers, *Commerce—A Retreat from Clarity: The Supreme Court Adds a Wrinkle to the “Aggregated Effects” Doctrine of its Commerce Clause Jurisprudence—United States v. Morrison*, 519 U.S. 598 (2000), 75 TEMPLE L. REV. 163, 194-96 (2002).

108. *Id.* at 196.

the point that under this broad definition, the assault of a woman in *Morrison* or possession of a gun in *Lopez* would certainly be inherently economic.¹⁰⁹ In both cases, the perpetrators made choices to “[expend] personal resources” to satisfy personal “wants,” which satisfies Judge Posner’s broad definition.¹¹⁰ The fact that the Court in *Lopez* and *Morrison* determined that gun possession and the assault of a woman are not “economic in nature” (or “noncommercial”) suggests that the Court did not accept Judge Posner’s broad view in Commerce Clause cases. Alternatively, economist Ronald Coase, creator of the “Coase Theorem” in law and economics,¹¹¹ advocates a more limited definition of “economics,” characterizing it as “only [the] traditional institutions which bind together our economy, such as: firms, markets for goods and services, labor markets, capital markets, the banking system and international trade.”¹¹²

Regardless of which view of “economics” is more convincing, the Supreme Court’s Commerce Clause jurisprudence is shifting toward Coase’s more limited, transactional definition. In *Gonzales v. Raich*, the Court considered whether Congress has the authority under the Commerce Clause to pass provisions of the Controlled Substances Act (“CSA”) prohibiting the local cultivation and use of marijuana.¹¹³ In holding that Congress could regulate this activity under its commerce power, Justice Stevens explained that Congress can regulate noneconomic activity by passing laws which are “essential [parts] of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.”¹¹⁴ In other words, Congress can pass laws regulating noneconomic activity if the law is part of an “ambitious, far-reaching federal regulation.”¹¹⁵

109. *Id.* at 195-96.

110. *Id.*

111. Steven G. Medema & Richard O. Zerbe, Jr, *The Coase Theorem*, in 1 *ENCYCLOPEDIA OF LAW AND ECONOMICS* 836 (Boudewijn Bouckaert & Gerrit De Geest, eds., 2000).

112. Ronald H. Coase, *Economics and Contiguous Disciplines*, 7 J. LEGAL STUD. 201, 206-07 (1978); see Powers, *supra* note 107, at 194-96.

113. See *Gonzales v. Raich*, 545 U.S. 1 (2005).

114. *Id.* at 24.

115. Ann Schober, *United States v. Morrison 15 Years Later: How the Supreme Court’s Disjointed Adjudication of Commerce Clause Legislation Opens A Back Door to Restoring Federal Civil Recourse for Certain Victims of Gender-Based Violence*, 34 J. L. & COM. 161, 175 (2015).

In his discussion of “economics,” Justice Stevens distinguished marijuana production and use from the regulated activities in *Lopez* and *Morrison*:

Unlike those at issue in *Lopez* and *Morrison* the activities regulated by the CSA are quintessentially economic. “Economics” refers to “the production, distribution, and consumption of commodities.” Webster’s Third New International Dictionary 720 (1966). The CSA is a statute that regulates the production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market.¹¹⁶

Justice O’Connor, in her *Gonzales* dissent, argues that this dictionary definition of “economics” is too broad.¹¹⁷ The majority’s focus on “production, distribution, and consumption of commodities,” however, seems to fit with Coase’s limited characterization of economics involving firms, markets for goods and services, and labor markets – not Posner’s general view of general “choices” in the face of limited resources.¹¹⁸

FGM thus cannot be considered “economic in nature” under the narrow standard of *Lopez* and *Morrison*, as informed by the “economics” discussion in *Raich*. First, the “nature” of FGM does not inherently involve the “production, distribution, [or] consumption of commodities.”¹¹⁹ As discussed, *Lopez* seems to require that the activity be inextricably tied to economic activity – in other words, the activity cannot occur in a noneconomic way for Congress to be able to regulate it under the Commerce Clause.¹²⁰ AHA’s suggestion that FGM is usually performed for compensation, and that it often used to increase a victim’s “bride price”¹²¹ only provides an example of when the practice *can* be tied to a transactional economic exchange. FGM is frequently performed in

116. *Raich*, 545 U.S. at 25-26.

117. *Id.* at 49 (O’Connor, J., dissenting) (referring to the majority’s broad definition of “economics” as “breathtaking”).

118. See Coase, *supra* note 112.

119. *Raich*, 545 U.S. at 25-26.

120. See *United States v. Lopez*, 514 U.S. 549, 566 (1995) (holding that possession of a gun in a school zone is a noncommercial activity and outside Congress’ Commerce Clause authority, even though the gun in the *Lopez* case was brought to school to be sold for \$40).

121. Brief of *Amicus Curiae* AHA Foundation in Support of the United States of America at 13, *United States v. Nagarwala*, 350 F. Supp. 3d 613 (E.D. Mich. 2018) (No. 18-mc-51358).

the home by family members or neighbors, a gruesome situation in which compensation is unlikely.¹²²

Further, although FGM is frequently used for the horrific purpose of increasing a victim's "bride price" (which likely fits with *Raich's* transactional, commodity-based approach to "economics"), increasing bride price is not a purpose *inherently* tied to FGM. The United Nations Population Fund (the "UNPF") lists other prominent purposes for FGM besides increasing the marriage "value" of a victim, where these purposes vary by culture and religion, and can exist independently of each other.¹²³ Additionally, many cultures perform FGM under the mistaken idea that it improves hygiene, or "aesthetic appeal."¹²⁴ FGM is also performed in some cultures for the purpose of adhering to religious doctrine requiring the practice,¹²⁵ and some cultures see FGM as a method of preserving virginity before marriage.¹²⁶

Although attempts to improve hygiene and aesthetics, adhere to religious doctrine, and attempts to preserve virginity could be seen as "economic" activities under Judge Posner's broad definition, they do not fit the limited transactional definition used in *Raich's* Commerce Clause discussion. It is difficult to conceive of a practice performed for religious beliefs (in the home, without compensation) as related to some kind of market transaction or "commodity." The possibility of FGM being performed without any connection to "economics" as characterized by *Raich* suggests that

122. Immigr. & Refugee Board of Can., Somalia: Information on female genital mutilation in Somalia, on the methods used in various regions and on the consequences of refusal; also, information on the presence in Somalia of women's organizations concerned with this issue, REFWORLD (Sept. 1, 1996), <https://www.refworld.org/docid/3ae6aaab44.html> [<https://perma.cc/W32J-GV84>]; Delegation of the Eur. Union to Guinea, *Female Genital Mutilation... EU resolute to end this torture!* (Feb. 6, 2019), https://eeas.europa.eu/delegations/guinea/57697/female-genital-mutilation%E2%80%A6eu-resolute-end-torture_az [<https://perma.cc/4D8Y-WVQU>].

123. See U.N. Population Fund, *Female genital mutilation (FGM) frequently asked questions*, U.N. POPULATION FUND (July 2019), <https://www.unfpa.org/resources/female-genital-mutilation-fgm-frequently-asked-questions#> [<https://perma.cc/SC89-NFMU>] [hereinafter U.N. Population Fund]; *G.A. Res.*, *supra* note 1 (stating that "[w]here it is believed that being cut increases marriageability, FGM is more likely to be carried out." This implies that FGM is not used to increase marriageability in all cultures, or in every instance).

124. U.N. Population Fund, *supra* note 123.

125. *Id.*

126. *Id.*

it is not *inherently* “economic in nature,” since *Lopez* suggests that an activity cannot fall under Congress’s Commerce power if it can be performed in a noneconomic way.¹²⁷

IV. CONGRESSIONAL AUTHORITY TO PASS TREATY- IMPLEMENTING LEGISLATION AS A BASIS FOR CRIMINALIZING FGM

Under *Missouri v. Holland*, Congress has the authority to pass legislation “necessary and proper” for implementing a treaty, even if the legislation regulates an activity outside Congress’s Commerce Power.¹²⁸ This Section will first explain Congress’ treaty-implementing power under *Holland*, and illustrate its application by showing how Congress might have the authority to criminalize violence against women if CEDAW were ratified. Next, this Section will explain the *Nagarwala* Court’s holding that the FGM Act is not a valid exercise of Congress’ treaty-implementing power (in *Nagarwala*, the treaty at issue is the ICCPR). This Section will point out that Daniel Rice makes a strong case that the District Court ignored Supreme Court precedent requiring a broad inquiry of treaty interpretation tools beyond the plain text of the ICCPR. The Section will conclude by pointing out that the United States’ ratification of CEDAW would likely give Congress a basis to pass the FGM Act under its treaty-implementing power.

A. Congress’ Treaty-Implementing Power as Authority for Legislation

The Tenth Amendment to the US Constitution states that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”¹²⁹ Although there is debate on the actual meaning of this language, the decisions in *Lopez* and *Morrison* suggest that it acts a “shield” for the states, reserving authority not granted to Congress under Article I to the states.¹³⁰

127. See *United States v. Lopez*, 514 U.S. 549, 561 (1995).

128. See *Missouri v. Holland*, 252 U.S. 416 (1920).

129. U.S. CONST. amend. X.

130. See Martin Flaherty, *Are We to be a Nation?: Federal Powers vs “States’ Rights” in Foreign Affairs*, 70 U. COLO. L. REV. 1277, 1283 (1999) (explaining the “shield” view of federalism). For the alternative interpretation of the Tenth Amendment as a “truism,” see *United States v. Darby Lumber Co.*, 312 U.S. 100 (1941) (“The amendment states but a

For example, *Morrison*'s holding that VAWA exceeded Congress' authority under its Article I commerce power "awakened" the Tenth Amendment by concluding that a power not given to Congress (regulating sexual assault) is reserved to the states, although the majority never actually cites the Tenth Amendment in its opinion.¹³¹

The 1920 opinion in *Holland* is seen as articulating an exception to this Tenth Amendment state shield: Congress' Article I authority to pass laws implementing treaties.¹³² *Holland* stands for the proposition that even if a regulated activity exceeds Congress' Article I authority (like violence against women or gun possession), Congress can still regulate the activity if the law implements a ratified treaty.¹³³ The facts from *Holland* illustrate this rule.¹³⁴ In 1916, the United States and the United Kingdom (acting for Canada) signed the Migratory Bird Treaty, which contained an agreement to "adopt some uniform system of protection" against the "indiscriminate slaughter" of migratory birds.¹³⁵ To implement this treaty, Congress passed the Migratory Bird Treaty Act of 1918, which regulated the hunting and capture of migratory birds in the United States.¹³⁶ The State of Missouri challenged the law, arguing that the regulation of wild game is a reserved right of the states under the Tenth Amendment.¹³⁷ Justice Holmes rejected this argument, explaining that even if an activity's regulation is reserved for the states, Congress can regulate the

truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers."); Frandy St. Louis, *The Decline of Mandatory Physical Education in Grade Schools Resulted in the Current Childhood Obesity Crisis and Consequently an Unsustainable Rise in Health Care Spending*, 10 IND. HEALTH L. REV. 629, 651 (2013).

131. *Morrison*, 529 U.S. at 615 (referring to "areas of traditional state regulation"); Warren Norred, *Removing Mud in the Clean Water Act: The Ninth Amendment as a Limiting Factor in Chevron Analysis*, 14 TEX. WESLEYAN L. REV. 51, 74 (2007) (explaining the Court's reliance on the Tenth Amendment in *Lopez* and *Morrison*).

132. *Missouri v. Holland*, 252 U.S. 416, 433 (1920).

133. *See id.*

134. *Id.* at 430-32.

135. *Id.*

136. *Id.* at 431.

137. *Id.*

activity under its constitutional authority to pass treaty-implementing legislation:

To answer this question it is not enough to refer to the Tenth Amendment . . . because by Article II, § 2, the power to make treaties is delegated expressly, and by Article VI treaties made under the authority of the United States, along with the Constitution and laws of the United States made in pursuance thereof, are declared the supreme law of the land. If the treaty is valid, there can be no dispute about the validity of the statute under Article I, § 8 as a necessary and proper means to execute the powers of the Government . . .¹³⁸

B. Holland as Congress' Basis for Implementing VAWA under CEDAW

Another illustration of the *Holland* rule involves *Morrison*, where the Court held that the provision of VAWA granting women a federal cause of action for sexual assault exceeded Congress' authority.¹³⁹ Even though Congress does not have the authority to pass the VAWA provision under *Morrison*, the rule from *Holland* suggests that Congress *would* have such authority if the United States ratified a treaty with a commitment to provide sexual assault victims a federal cause of action. CEDAW, a 1979 United Nations General Assembly treaty, has such a provision. CEDAW General Recommendation 19 includes gender-based violence as a kind of gender discrimination, which requires a judicial remedy under CEDAW.¹⁴⁰ Although UN general recommendations (sometimes called "general comments") are not legally binding, they provide interpretive guidance by articulating how signatory nations can fulfill their treaty obligations.¹⁴¹ The United States, however, is the only nation in the Western Hemisphere that has not

138. *Id.* at 432.

139. *Morrison*, 529 U.S. at 618 ("The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States").

140. Comm. on the Elimination of Discrimination Against Women, General Recommendation No. 19: Violence Against Women, U.N. Doc. A/47/38 (1992).

141. See *United States v. Duarte-Acero*, 296 F.3d 1277, 1279 (11th Cir. 2002); Rice, *supra* note 11; Lisa Davis, *Preventing Torture: An Introduction to the Symposium Issue*, 11 N.Y. CITY L. REV. 179, 180 (2008).

yet ratified CEDAW.¹⁴² President Jimmy Carter only *signed* the treaty in 1980, and treaties are not effective in the United States until they are ratified.¹⁴³ If the United States ratified CEDAW, Congress might have the authority to pass the same VAWA provision struck down by *Morrison* as a valid exercise of its Article II treaty-implementing power under *Holland*.¹⁴⁴

Holland's removal of the Tenth Amendment as a barrier to treaty-implementing legislation has been criticized as broadening Congress' regulatory authority.¹⁴⁵ Justice Scalia's concurrence in *Bond v. United States* makes this point by suggesting that the holding from *Lopez* could be reversed if the United States simply "[negotiated] a treaty with Latvia providing that neither sovereign would permit the carrying of guns near schools."¹⁴⁶ Professor Michael Glennon argues, however, that Justice Scalia's fears have not materialized, since US treaties mostly focus on "bread-and-butter international issues"—not local activity traditionally regulated by states, which is more likely to implicate the Tenth Amendment.¹⁴⁷ The Supreme Court had the opportunity to overrule *Holland* in the 2014 criminal case *Bond*, but Chief Justice Roberts dodged the question through statutory interpretation by holding that the defendant's conduct did not fall within the treaty-implementing statute.¹⁴⁸

142. Johanna Kalb, *Dynamic Federalism in Human Rights Treaty Implementation*, 84 TUL. L. REV. 1025, 1034, 1060-61 n.185 (2010).

143. *Id.*

144. Barbara Stark, *Domestic Violence and International Law: Good-Bye Earl (Hans, Pedro, Gen, Chou, etc.)*, 47 LOY. L. REV. 255, 279 (2001). For another illustration of Congress' authority to regulate activity under its treaty-implementing power, even though the activity would normally exceed its enumerated powers, see Gerald L. Neuman, *The Global Dimension of RFRA*, 14 CONST. COMMENT. 33, 46 (1997) (arguing that even if the Religious Freedom Restoration Act's creation of religious exemptions exceeds Congressional authority, Congress could justify the law as an implementation of the ICCPR's guarantee of the "[f]reedom to manifest one's religion or beliefs" under *Holland*).

145. See S. REP. NO. 412, 83RD CONG., 1ST SESS. 1 (1953) (Senator John Bricker proposed a constitutional Amendment to overrule *Holland* and limit Congress' treaty-implementing authority: "[a] treaty shall become effective as internal law only through legislation which would be valid in the absence of a treaty."); Charles A. Lofgren, *Missouri v. Holland in Historical Perspective*, 1975 SUP. CT. REV. 77, 118.

146. *Bond v. United States*, 572 U.S. 844, 878 (2014) (Scalia, J., concurring).

147. Michael J. Glennon & Robert D. Sloane, *The Sad, Quiet Death of Missouri v. Holland: How Bond Hobbled the Treaty Power*, 41 YALE J. INT'L L. 51, 58 (2016).

148. Stephanie Peral, *Bond v. United States: Deciphering Missouri v. Holland and the Scope of Congress's Powers when Implementing a Non-Self-Executing Treaty*, 9 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 179, 188 (2014).

*C. The Nagarwala Court Should Have Held That the ICCPR
Authorizes Congress to Criminalize FGM*

The ICCPR, which was the treaty at issue in *Nagarwala*, was adopted by the United Nations General Assembly in 1966, and went into effect in 1976.¹⁴⁹ The United States ratified the treaty in 1992 with several reservations.¹⁵⁰ One of the reservations is the United States' declaration that Articles 1 through 27 of the ICCPR are not "self-executing."¹⁵¹ A self-executing treaty "operates of itself without the aid of any legislative provision," meaning the treaty becomes "the supreme law of the land" after ratification without Congress implementing its provisions through legislation.¹⁵² A non-self-executing treaty like the ICCPR, however, requires Congress to use its treaty implementing power to enact the provisions of the treaty as domestic law.¹⁵³ Courts have held that legislation implementing a treaty needs to be at least "rationally related" to the treaty.¹⁵⁴

The government in *Nagarwala* argued that the FGM Act can be justified as an implementation of two provisions of the ICCPR: Article 3 and Article 24.¹⁵⁵ Article 3 of the ICCPR states that "[t]he States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant."¹⁵⁶ In a brief paragraph, the *Nagarwala* Court rejected the government's argument that the FGM Act was a "necessary and proper" implementation of ICCPR Article 3, pointing out that there is no

149. ICCPR, *supra* note 24, at 171; Canadian Civil Liberties Association, *Summary: International Covenant on Civil and Political Rights (ICCPR)*, CCLA (Oct. 27, 2015), <https://ccla.org/summary-international-covenant-on-civil-and-political-rights-iccpr/> [<https://perma.cc/YNS3-NNG2>].

150. American Civil Liberties Union, *FAQ: The Covenant on Civil & Political Rights (ICCPR)*, ACLU (Apr. 2019), <https://www.aclu.org/other/faq-covenant-civil-political-rights-iccpr> [<https://perma.cc/32CQ-8W56>]; *U.S. reservations, declarations, and understandings, International Covenant on Civil and Political Rights*, 138 CONG. REC. S4781-01 (daily ed. Apr. 2, 1999).

151. *U.S. reservations, declarations, and understandings, International Covenant on Civil and Political Rights*, 138 CONG. REC. S4781-01 (daily ed. Apr. 2, 1999).

152. *Medellin v. Texas*, 552 U.S. 491, 505 (2008) (quoting *Foster v. Neilson*, 27 U.S. 253, 299 (1829)).

153. *Id.*

154. *United States v. Lue*, 134 F.3d 79, 84 (2d Cir. 1998) (citing *McCulloch v. Maryland*, 17 U.S. 316 (1819)).

155. *United States v. Nagarwala*, 350 F. Supp. 3d 613, 617-18 (E.D. Mich. 2018).

156. ICCPR, *supra* note 24, art. 3.

rational relationship between FGM and “civil and political rights.”¹⁵⁷ In the court’s view, civil and political rights include “the freedom of expression, the right to participate in elections, and protections for defendants in criminal proceedings,” while the FGM Act seeks to ban a “particular form of physical abuse.”¹⁵⁸

The court’s analysis of ICCPR Article 3, though brief, is likely correct. Specific examples of the “civil and political rights” included in the ICCPR are freedom of movement;¹⁵⁹ the right to a fair and public hearing by an impartial tribunal;¹⁶⁰ freedom of thought, conscience, and religion;¹⁶¹ peaceful assembly;¹⁶² freedom of association with others;¹⁶³ and protection of ethnic, religious, or linguistic minorities.¹⁶⁴ Although the ICCPR never defines “civil and political rights,” the rights listed in the treaty suggest that the ICCPR does not encompass FGM, a “particular form of physical abuse.”¹⁶⁵

The court’s more controversial holding is that the FGM Act is not a valid implementation of ICCPR Article 24(1).¹⁶⁶ Article 24(1) of the ICCPR states that “[e]very child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.”¹⁶⁷ Even though the court concedes that the relationship between Article 24(1) and the FGM Act is “arguably closer” than that of Article 3, the court dismisses the government’s argument in just two sentences: “Article 24 is an anti-discrimination provision, which calls for the protection of minors without regard to their race, color, sex, or other characteristics. As laudable as the prohibition of a particular type of abuse of girls may be, it does not logically further the goal of protecting children on a nondiscriminatory basis.”¹⁶⁸

157. *Nagarwala*, 350 F. Supp. 3d at 618.

158. *Id.*

159. ICCPR, *supra* note 24, art. 12.

160. ICCPR, *supra* note 24, art. 14.

161. ICCPR, *supra* note 24, art. 18.

162. ICCPR, *supra* note 24, art. 21.

163. ICCPR, *supra* note 24, art. 22.

164. ICCPR, *supra* note 24, art. 27.

165. *United States v. Nagarwala*, 350 F. Supp. 3d 613, 618 (E.D. Mich. 2018).

166. *Id.*

167. ICCPR, *supra* note 24, art. 24(1).

168. *Nagarwala*, 350 F. Supp. 3d at 618.

Judge Friedman essentially reasons that Article 24(1)'s protection of children "without discrimination as to . . . sex," has no rational relationship to the FGM Act, which draws a sex-based distinction by specifically protecting females.¹⁶⁹ This brief, literal, textual analysis ignores established Supreme Court precedent regarding the tools of treaty interpretation. Although a conflict existed between the Rehnquist Court justices regarding the permissible sources of treaty interpretation, the 2008 decision in *Medellín v. Texas*¹⁷⁰ reaffirmed the Court's willingness to utilize interpretive tools beyond the plain text of treaties.¹⁷¹ The Court recognized that although treaty interpretation should "begin with [the treaty's] text," a ratified treaty is essentially "an agreement among sovereign powers," so the Court can consider "negotiation and drafting history of the treaty as well as 'the postratification understanding' of signatory nations."¹⁷²

Daniel Rice makes a strong case that Judge Friedman failed to consider the "negotiation and drafting history" of the ICCPR in its decision.¹⁷³ When President George H.W. Bush transmitted the ICCPR to the Senate Foreign Relations Committee, his administration included an "understanding," explaining that Article 24 could be interpreted in light of the UN Human Rights Committee's General Comments regarding gender discrimination (the Human Rights Committee is the group responsible for overseeing the ICCPR's implementation).¹⁷⁴ Although the George H.W. Bush Administration's "understanding" only references General Comment 18, which explains nondiscrimination in general, General Comment 28 elaborates on this nondiscrimination concept by clarifying that countries should ban "cultural or religious practices which jeopardize the freedom and well-being of female children," which seems to encompass FGM.¹⁷⁵ Perhaps the strongest indicator from the Human Rights Committee that the ICCPR combats FGM is the Human Rights Committee's

169. Rice, *supra* note 11.

170. *Medellín v. Texas*, 552 U.S. 491, 491 (2008).

171. David J. Bederman, *Medellín's New Paradigm for Treaty Interpretation*, 102 AM. J. INT'L L. 529, 530 (2008).

172. *Medellín*, 552 U.S. at 507 (citing *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 226 (1996)) (emphasis added).

173. *Id.*; Rice, *supra* note 11.

174. S. Rep. No. 102-23, at 14 (1992); *see also* Rice, *supra* note 11.

175. S. Rep. No. 102-23, at 14 (1992); *see* Rice, *supra* note 11.

statement that it needs FGM statistics from the countries where the practices are prevalent to gauge compliance with ICCPR Article 24.¹⁷⁶ Although the Human Rights Committee's statements are not legally binding on treaty signatories, the Eleventh Circuit has recognized that their General Comments are a guiding source of interpretation for the ICCPR.¹⁷⁷

D. Congress Likely has the Authority to Pass the FGM Act if the United States Ratifies CEDAW

The FGM Act, like VAWA, might find firmer footing in provisions of the signed-but-not-ratified treaty CEDAW.¹⁷⁸ CEDAW's creation was facilitated by the Commission on the Status of Women (the "CSW"), a group founded in 1946 as a subcommission of the United Nations Commission on Human Rights.¹⁷⁹ Although the CSW started as a small group of fifteen representatives from fifteen countries, the CSW has become the principal global intergovernmental body for promoting women's rights.¹⁸⁰ As a longtime advocate against FGM, the CSW was instrumental in supporting a UN General Assembly Agenda titled *Intensifying global efforts for the elimination of female genital mutilations*.¹⁸¹

In 1974, the CSW began drafting CEDAW with the goal of creating a "single, comprehensive and binding international instrument" to combat discrimination against women.¹⁸² The UN

176. U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000); see Rice, *supra* note 11.

177. See *United States v. Duarte-Acero*, 296 F.3d 1277, 1279 (11th Cir. 2002); see also Rice, *supra* note 11.

178. Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW]; see Johanna Kalb, *Human Rights Treaties in State Courts: The International Prospects of State Constitutionalism After Medellin*, 115 PENN ST. L. REV. 1051, 1052 (2011).

179. *A brief history of the Commission on the Status of Women*, UN WOMEN, <https://www.unwomen.org/en/csw/brief-history> [<https://perma.cc/34JG-6BSZ>] (last visited Apr. 5, 2020); *Convention on the Elimination of All Forms of Discrimination against Women - Twentieth Anniversary 1979-1999*, UNITED NATIONS, <https://www.un.org/womenwatch/daw/cedaw/cedaw20/history.htm> [<https://perma.cc/B3DF-ND8C>] (last visited Apr. 5, 2020) [hereinafter CEDAW 1979-1999].

180. *Commission on the Status of Women*, UN WOMEN, <https://www.unwomen.org/en/csw> [<https://perma.cc/36CB-5WHK>] (last visited Apr. 5, 2020).

181. G.A. Res. C.3/67/L.21/Rev.1 (Nov. 16, 2012).

182. CEDAW 1979-1999, *supra* note 179.

General Assembly adopted CEDAW in 1979 with a vote of 130 Member States in favor of the treaty, zero against the treaty, and ten abstentions.¹⁸³ As of 2020, 189 nations have signed, ratified, or acceded to CEDAW.¹⁸⁴ Only two of these 189 nations have signed but not ratified CEDAW—the United States and Palau.¹⁸⁵

Some suggest that opposition to CEDAW ratification in the United States comes from the “idiosyncratic recommendations” made by the United Nations Committee to member nations.¹⁸⁶ The United Nations Committee reviews member nations’ compliance with CEDAW, and provides recommendations on how to better implement the treaty, sometimes emphasizing controversial issues like abortion.¹⁸⁷ In particular, CEDAW Article 12(1) states that “States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.”¹⁸⁸ Professor Ann Elizabeth Mayer counters CEDAW never actually mentions abortion, pointing to a 1994 Senate Foreign Relations Committee statement that nothing in CEDAW creates a right to abortion.¹⁸⁹ Professor Mayer acknowledges, however, that this statement might have been made to appease conservative Senators’ constituency.¹⁹⁰ Others have suggested that the United States’ delay in ratifying CEDAW is attributable to a history of “congressional mistrust and hostility toward international treaties, particularly those concerning human rights issues.”¹⁹¹

183. *Id.*; *Frequently Asked Questions (FAQ) about CEDAW*, UN WOMEN, <https://asiapacific.unwomen.org/en/focus-areas/cedaw-human-rights/faq> [<https://perma.cc/8LXA-J9WV>] (last visited Apr. 5, 2020).

184. *Status of Treaties: 8. Convention on the Elimination of All Forms of Discrimination Against Women*, U.N. TREATY COLLECTION (Apr. 12, 2020) https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en [<https://perma.cc/WW4V-QB39>].

185. *Id.*; see Mark P. Lagon, *Reflections on Global Justice and American Exceptionalism: The United States as a Model for the World?*, *WORLD AFFAIRS* 42, 47 (2017).

186. *Id.*

187. *Id.*; 146 CONG. REC. S3925-02 (Mar. 8, 2000) (Statement of Jesse Helms).

188. CEDAW, *supra* note 178, art. 12.

189. Ann Elizabeth Mayer, *Reflections on the Proposed United States Reservations to CEDAW: Should the Constitution Be an Obstacle to Human Rights?*, 23 *HASTINGS CONST. L.Q.* 727, 807 (1996).

190. *Id.*

191. Julia Ernst, *U.S. Ratification of the Convention on the Elimination of All Forms of Discrimination Against Women*, 3 *MICH. J. GENDER & L.* 299, 312 (1995). For another

If Judge Friedman is correct about the FGM Act exceeding Congress' commerce power in *Nagarwala*, the FGM Act might still be a valid exercise of Congress' treaty-implementing authority under *Holland* if the United States ratifies CEDAW. Article 2(f) of CEDAW is the party nations' commitment to:

condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

(f) . . . all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.¹⁹²

Further, CEDAW Article 5(a) states that:

States Parties shall take all appropriate measures:

(a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.¹⁹³

Although neither of these provisions specifically reference FGM, the references to "customs" and "practices" based on "discrimination" or "stereotyped roles" encompasses FGM more directly than Articles 3 and 24 of the ICCPR, which broadly refer to "civil and political rights."¹⁹⁴ In 1990, the Committee on the Elimination of Discrimination Against Women (the "CEDAW Committee") explicitly clarified that CEDAW covers the eradication of FGM in General recommendation 14.¹⁹⁵ The CEDAW Committee recommended that member states should "take appropriate and effective measures with a view to eradicating the practice of female circumcision."¹⁹⁶ Nine years later, the CEDAW Committee

argument that CEDAW does not contain a commitment to support abortion, see Rangita de Silva de Alwis & Amanda M. Martin, "Long Past Time": CEDAW Ratification in the United States, 3 U. PENN. J. L. & PUB. AFFAIRS 15, 46 (2018).

192. CEDAW, *supra* note 178, art. 2(f).

193. CEDAW, *supra* note 178, art. 5(a).

194. CEDAW, *supra* note 178, arts. 2(f), 5(a).

195. G.A. Res. 45/38, General recommendation No. 14: Female circumcision (1990), available at https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/INT_CEDAW_GEC_3729_E.pdf [https://perma.cc/TJ3S-HNJP].

196. *Id.*

confirmed this interpretation when it issued General recommendation 19, which states that CEDAW nations should combat cultural or religious practices like FGM, which carries a high risk of “death and disability.”¹⁹⁷

E. The Post-Ratification Conduct of CEDAW Signatory Nations Suggests That CEDAW Could be a Basis for an FGM Ban in the United States

In addition to these clarifying CEDAW recommendations, the fact that some member nations have based domestic FGM bans on CEDAW indicates that the treaty should encompass FGM. The Supreme Court has recognized that the interpretations of treaties by foreign governments and their courts after ratification are valuable indicators of the meaning of treaty provisions.¹⁹⁸ Even strict textualists like Justice Scalia utilize this post-ratification conduct approach.¹⁹⁹

An illustration of post-ratification conduct as an interpretive tool is *Zicherman v. Korean Airlines*, in which the Supreme Court considered whether plaintiffs could recover loss-of-society damages for the death of a family member in a plane crash under the Warsaw Convention.²⁰⁰ Article 17 of the Warsaw Convention states that airline carriers “shall be liable for *damage sustained* in the event of the death or wounding...”²⁰¹ In holding that cognizable damages under the Warsaw Convention should be determined by the domestic law of the signatory parties, Justice Scalia’s unanimous decision emphasizes the post-ratification conduct of the signatory parties as evidence of the meaning of

197. G.A. Res. 54/38/Rev.1, chap. I. General recommendation No. 24: Article 12 of the Convention (women and health) (1999), available at https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/INT_CEDAW_GEC_4738_E.pdf [<https://perma.cc/W3LZ-FLZQ>]; U.N. Population Fund, *supra* note 123.

198. *Medellin v. Texas*, 552 U.S. 491, 507 (2008); *Zicherman v. Korean Air Lines Co., Ltd.*, 516 U.S. 217, 226 (1996); VED P. NANDA ET AL., LITIGATION OF INTERNATIONAL DISPUTES IN U.S. COURTS § 10:20 (2019).

199. *Zicherman*, 516 U.S. at 226.

200. *Id.* at 218-19.

201. *Id.* at 221; Convention for the Unification of Certain Rules for International Carriage by Air (the “Warsaw Convention”) art. 7, Oct. 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 11 (emphasis added).

treaty phrase “damage sustained.”²⁰² Justice Scalia points out that England, Germany, and the Netherlands passed domestic legislation specifying damages under Warsaw Convention cases, suggesting that these signatory nations shared this interpretation.²⁰³ Further, Canada passed national legislation specifying the kinds of plaintiffs entitled to a cause of action under the Warsaw Convention, but left the question of recoverable damages for the provinces to decide.²⁰⁴ Justice Scalia and the unanimous Supreme Court saw the conduct of signatory nations’ legislatures and courts as valuable evidence of a treaty’s meaning, since “[signatory nations’] conduct generally evinces their understanding of the agreement they signed.”²⁰⁵

CEDAW signatory nations have recognized the treaty as a commitment to combat FGM through the implementation of domestic legislation.²⁰⁶ Ghana, a country where approximately 3.8% of women are victims of FGM,²⁰⁷ ratified CEDAW in 1989.²⁰⁸ Shortly after Ghana’s ratification, Ghanaian President Jerry Rawlings issued a formal declaration denouncing FGM.²⁰⁹ In 1994, in response to a CEDAW recommendation, Ghana’s Parliament reaffirmed its commitment to eradicate FGM by amending its Criminal Code of 1960 (Act 29) to criminalize FGM, using similar language to the United States’ FGM Act: “[w]hoever excises, infibulates[,] or otherwise mutilates the whole or any part of the labia minora, labia majora[,] and the clitoris of another person commits an offence and shall be guilty of a second degree felony and liable on conviction to imprisonment of not less than three years.”²¹⁰

202. *Zicherman*, 516 U.S. at 218-19; Michelle M. Ressler, *Compensable Damages Revisited Under the Warsaw Convention: Zicherman v. Korean Air Lines, A New Look at Loss of Society*, 5 U. MIAMI Y.B. INT’L L. 65, 103 (1997).

203. *Id.*

204. *Zicherman*, 516 U.S. at 218-19; Ressler, *supra* note 202, at 103.

205. *United States v. Stuart*, 489 U.S. 353, 369 (1989).

206. Matilda Aberese Ako & Patricia Akweongo, *The limited effectiveness of legislation against female genital mutilation and the role of community beliefs in Upper East Region, Ghana*, 17 REPRODUCTIVE HEALTH MATTERS 47, 47 (2009).

207. *Ghana: The Law and FGM*, 28TOOMANY 1 (2018), [https://www.28toomany.org/static/media/uploads/Law%20Reports/ghana_law_report_v1_\(september_2018\).pdf](https://www.28toomany.org/static/media/uploads/Law%20Reports/ghana_law_report_v1_(september_2018).pdf) [<https://perma.cc/EL9N-TR4F>] [hereinafter 28TOOMANY].

208. Ako & Akweongo, *supra* note 206, at 47.

209. *Id.*

210. Ghana Criminal Code of 1960 (Act 29) § 69(A)(1); Ako & Akweongo, *supra* note 206, at 47-48.

Similarly, Senegal's criminalization of FGM is seen as an implementation of CEDAW, which Senegal signed in 1980, and ratified in 1985.²¹¹ In Senegal, approximately 22.7% of women aged fifteen to forty-nine are FGM victims, although prevalence varies drastically by region (in the southern region of Senegal, FGM rates are as high as 77.8%).²¹² In 1999, Senegal amended its Penal Code to criminalize FGM, although a 2018 report estimates that fewer than eight prosecutions have taken place under the statute.²¹³ Other nations responding to CEDAW ratification by combatting FGM through criminalization, education, and outreach programs include Benin, Burkina Faso, and Côte d'Ivoire.²¹⁴ American courts' willingness to examine the post-ratification CEDAW interpretation of these nations is more evidence that CEDAW could justify Congress' implementation of the FGM Act.

V. CONCLUSION

Although the DOJ has withdrawn its appeal to the Sixth Circuit in the *Nagarwala* case, its letter to the House announcing the withdrawal contained a proposed amendment to the FGM Act in light of Judge Friedman's decision.²¹⁵ Instead of simply criminalizing FGM, the proposed amendment would criminalize FGM with some nexus to interstate commerce.²¹⁶ In particular, section 116(e)(3) of the proposed amendment criminalizes FGM where "any payment of any kind was made . . ." for the FGM.²¹⁷ Daniel Rice argues that this would be an ineffective amendment, as it would be practically identical to the pre-*Nagarwala* version of the statute.²¹⁸ He points out that it would "almost always" be

211. 28TOOMANY, *supra* note 207; Ako & Akweongo, *supra* note 206, at 47.

212. 28TOOMANY, *supra* note 207.

213. Senegal Criminal Code art. 299; 28TOOMANY, *supra* note 207.

214. Ako & Akweongo, *supra* note 206, at 47.

215. Testimony of Professor Beth Van Schaack, Stanford Law School before the Tom Lantos Human Rights Commission United States House of Representatives Pursuing Accountability for Atrocities (June 13, 2019), available at https://humanrightscommission.house.gov/sites/humanrightscommission.house.gov/files/documents/PursuingAccountability_VanSchaack.pdf [<https://perma.cc/E3F3-MVYU>] [hereinafter Beth Van Schaack Testimony]; Letter from Noel J. Francisco, *supra* note 33 at B-1.

216. Beth Van Schaack Testimony, *supra* note 215; Letter from Noel J. Francisco, *supra* note 33, at B-1.

217. Letter from Noel J. Francisco, *supra* note 33, at C-1.

218. Rice, *supra* note 11.

possible to find some connection between FGM and interstate commerce, regardless of how the statute is written.²¹⁹

This amendment, however, seems to effectively bring the FGM Act within Congress' commerce power under the narrow "economic in nature" interpretations of *Lopez* and *Morrison* (particularly section 116(e)(3) of the amended FGM Act).²²⁰ After this amendment, the FGM Act is no longer criminalizing FGM in general, an act which *could* occur non-economically.²²¹ Section 116(e)(3) of the amendment essentially changes the regulated activity from "FGM" to "FGM for payment," which seems to be an inherently economic activity falling squarely within Congress' commerce power.²²²

In the wake of the *Nagarwala* decision, some states have taken a step in the right direction by pushing for the criminalization of FGM.²²³ State FGM criminalization is essential, since the lack of a federal ban leaves states without FGM laws at risk of becoming "destination states" for cutting.²²⁴ In Kentucky, eight Republican and three Democratic senators introduced a bipartisan bill which would make FGM a felony offense, requiring law enforcement to undergo training about FGM, and provide FGM victims a 10-year window to sue.²²⁵ State Senator Tom Buford stated that he has not heard of any opposition to the bill in Kentucky.²²⁶ Similarly, the Washington legislature has introduced a bill which would make

219. *Id.*

220. *United States v. Morrison*, 529 U.S. 598, 613 (2000); Letter from Noel J. Franisco, *supra* note 33.

221. U.N. Population Fund, *supra* note 123; *G.A. Res.*, *supra* note 1.

222. Letter from Noel J. Franisco, *supra* note 33.

223. Sarah Ladd, *Bipartisan group of Kentucky senators introduces bill to ban female genital mutilation*, LOUISVILLE COURIER J. (Jan. 14, 2020), <https://www.courier-journal.com/story/news/politics/2020/01/14/kentucky-senators-propose-anti-female-genital-mutilation-bill/4465209002/> [<https://perma.cc/MUQ6-7YQN>]; Wash. S. 5257, 66th Leg. (2019), available at <http://lawfilesexext.leg.wa.gov/biennium/2019-20/Pdf/Bills/Senate%20Bills/5257.pdf> [<https://perma.cc/W4AG-254Z>].

224. Karen McVeigh, *'US is moving backwards': female genital mutilation ruling a blow to girls at risk*, GUARDIAN (Nov. 22, 2018), <https://www.theguardian.com/society/2018/nov/22/us-is-moving-backwards-female-genital-mutilation-ruling-a-blow-to-girls-at-risk> [<https://perma.cc/6XCL-TAK6>].

225. Ky. Leg. 20 RS BR 104, available at https://apps.legislature.ky.gov/recorddocuments/bill/20RS/sb72/orig_bill.pdf [<https://perma.cc/7WR3-9U8L>].

226. Ladd, *supra* note 223.

FGM a felony.²²⁷ FGM is now a state crime in Michigan;²²⁸ however, the state's ban did not go into effect until *after* the DOJ brought federal charges in 2017 against Dr. Nagarwala for performing FGM in Michigan.²²⁹

In some states, however, FGM criminalization has faced greater hurdles. In Maine, Republican and Democratic state senators proposed a bill which would make performing FGM, transporting a minor outside the state for FGM, or consenting to the FGM of a girl a felony offense.²³⁰ The bill passed in Maine's Senate, but died in the House.²³¹ Although there was consensus that the practice should end, some Democrats in the Maine House opposed the bill because it criminalized "knowingly consenting" to a girl's FGM, which some viewed as potentially stigmatizing immigrants.²³² Some also argued that the language imposing penalties on those who consent to a girl's FGM might discourage victims from seeking treatment for their FGM complications to protect their parents.²³³ Similarly, a proposed Connecticut bill which would make FGM a state felony was opposed by testimony from Susan Yolen of Planned Parenthood of Southern New England.²³⁴ Yolen argued that although the organization opposes the practice, she believes that FGM criminalization "may only further isolate those who, now that they are in the U.S., can and should become more fully integrated into our way of life."²³⁵ Yolen instead advocated for "public health interventions" to end FGM.²³⁶

227. Wash. S. 5257, 66th Leg. (2019), available at <http://lawfilesexternal.wa.gov/biennium/2019-20/Pdf/Bills/Senate%20Bills/5257.pdf> [https://perma.cc/UAM7-XZN8].

228. Mich. Comp. Laws § 750.136 (2017).

229. Kate Ryan, *U.S. Government Backs Off Case of Female Genital Mutilation*, REUTERS (Apr. 12, 2019), <https://www.reuters.com/article/us-usa-womensrights-fgm/us-government-backs-off-case-of-female-genital-mutilation-idUSKCN1R02LA> [https://perma.cc/T3KB-MQER].

230. *NOT REAL NEWS: Maine Legislators Did Not Vote for Mutilation*, ASSOCIATED PRESS (Apr. 30, 2018), <https://apnews.com/a3f7fab597724dd4bbe32de03cc8f753> [https://perma.cc/4Z5V-23XZ].

231. *Id.*

232. *Id.*

233. *Id.*

234. Susan Haigh, *Connecticut renews push to ban female genital mutilation*, ASSOCIATED PRESS (Feb. 4, 2019), <https://apnews.com/5990eab48a2e41f0993d779ebb064eb8> [https://perma.cc/MV2Z-F6US].

235. *Id.*

236. *Id.*

States like Maine and Connecticut must criminalize FGM (like a majority of US states)²³⁷ now that the federal FGM ban has been held unconstitutional. Kimberly Schaefer, an immigration attorney in Idaho (which criminalized FGM in 2019)²³⁸ argues that criminalizing FGM in the United States allows women seeking asylum in the United States to escape FGM in their home country feel safer.²³⁹ Shaefer argues that women coming to the United States to escape FGM realize that “[the] safety that they thought they had isn’t really here” in states where the practice is not criminalized.²⁴⁰ Further, Health Law Professor Sondra Crosby testified on behalf of a proposed Massachusetts law criminalizing FGM, pointing out that “enacting a law against FGM could serve as a deterrent and provide women with a basis to resist cultural pressure from their families to have their daughters cut.”²⁴¹ FGM, a procedure often performed with “scissors, dirty razor blades or knives, and in unsterile conditions without anesthesia” is a life-altering physical assault with devastating health consequences.²⁴² Judge Friedman’s decision in *Nagarwala* signals a need for states to take the lead in protecting women and girls from this horrific practice.

237. *US Laws Against FGM – State by State*, EQUALITY NOW, https://www.equalitynow.org/us_laws_against_fgm_state_by_state [https://perma.cc/4ENF-QFK4] (last visited Apr. 5, 2020); Jillian McKoy, *Criminalizing FGM Is a Necessary Protective Measure*, B. U. SCH. OF PUB. HEALTH (Oct. 3, 2019), <https://www.bu.edu/sph/2019/10/03/criminalizing-fgm-is-a-necessary-protective-measure/> [https://perma.cc/TY9K-RS9F].

238. Idaho H.R. 114, 65th Cong. (2019), available at <https://legislature.idaho.gov/wp-content/uploads/sessioninfo/2019/legislation/H0114.pdf> [https://perma.cc/DRS4-JWLW].

239. Madelyn Beck, *Addressing Female Genital Mutilation In the Mountain West*, WYO. PUB. MEDIA (Sept. 4, 2019), <https://www.wyomingpublicmedia.org/post/addressing-female-genital-mutilation-mountain-west#stream/0> [https://perma.cc/JZV7-VLV4].

240. *Id.*

241. McKoy, *supra* note 237.

242. *Id.*